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COMMONWEALTH OF KENTUCKY
SUPREME COURT
NO. 2014-SC-717-DG

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BROWN-FORMAN CORPORATION AND
HEAVEN HILL DISTILLERIES, INC. APPELLANTS

Court of Appeals No. 2013-CA-2048-MR

v.

Appeal from Jefferson Circuit Court
Civil Action No. 2012-CA-3382
Division Nine, Hon. Judith McDonald-Burkman

BRUCE MERRICK, et al. APPELLEES

[redacted]JOINT REPLY BRIEF FOR APPELLANTS

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Certificate of Service

The undersigned certifies that on January 7, 2016, copies of Appellants' Reply Brief were sent by U.S. Mail to Samuel Givens, Jr., Clerk, Kentucky Court of Appeals, 360 Democrat Drive, Frankfort, KY 40601; the Honorable Judith McDonald-Burkman, Judge, Division Nine, Jefferson Circuit Court, 700 W. Jefferson Street, Louisville, KY 40202; and Counsel for Appellees: Douglas H. Morris, Lea A. Player, MORRIS & PLAYER PLLC, 1211 Herr Lane, Suite 205, Louisville, Kentucky 40222, and William F. McMurry, WILLIAM F. MCMURRY & ASSOCIATES, 624 West Main Street, Suite 600, Louisville, KY 40202.

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TABLE OF POINTS AND AUTHORITIES

Plaintiffs utterly fail to address the preemptive effects of the Clean Air Act as implemented in Kentucky. Instead, they claim that the Act's purpose and savings clauses leave the states "free to adopt additional protections through the courts or by statute as long [as] the requirements imposed are not less stringent than those established under the Act . . . ." [Plaintiffs' Brief at 11.] The Plaintiffs' brief is replete with references to cases from other states, which rely on provisions of the Act that authorize states to establish emissions limits which are more strict than the Act itself. But nowhere – **not even once** – do Plaintiffs refer to KRS 224.10-100(26), in which the Kentucky General Assembly explicitly rejected that option and, instead, directed state regulators to establish requirements for air emissions "no more stringent than federal requirements."

Plaintiffs never mention, much less negate, the preclusive effect of KRS 224.10-100(26). Plaintiffs make absolutely no attempt to explain why Kentucky judges and juries should be given a free rein to impose obligations on the Distillers that exceed federal law in the face of Kentucky's clearly expressed directive that the federal limits for air emissions are both the floor and the ceiling in this Commonwealth.

Plaintiffs' case citations from other states are inapposite here. For example, *Her Majesty the Queen in Right of the Province of Ontario v. Detroit*, 874 F.2d 332 (6th Cir. 1989), arose in Michigan, where a state statute (the Michigan Environmental Protection Act, "MEPA") "specifically authorizes the court to determine the validity, applicability, and reasonableness of any standard for pollution or

pollution control equipment set by state agency and to specify a new or different pollution control standard if the agency's standard falls short of the substantive requirements of MEPA." *Id.* at 337. Unlike these Plaintiffs, the plaintiffs in *Her Majesty* did not assert negligence, nuisance, or trespass claims; as specifically authorized by the Michigan legislature, they sought a court order requiring the City of Detroit to enforce existing air emission standards when issuing a permit.

In *Her Majesty*, the Sixth Circuit confirmed that, given a state's right to set emission standards that are more stringent than the Act, the Act did not preempt MEPA. But *Her Majesty* does nothing to support a private plaintiff's use of common-law tort claims to enjoin air emissions where the state in question has made very different policy choices than did Michigan. Kentucky has no statute analogous to MEPA, and no concomitant "state common law of environmental quality." *Id.* at 338. Instead, Kentucky has KRS 224.10-100(26), which forbids state regulators from exceeding the federal floor with respect to air emissions.

In *Merrick v. Diageo Americas Supply, Inc.*, 805 F.3d 685 (6th Cir. 2015), the Sixth Circuit relied on § 7416 of the Act, the "states right savings clause," to hold that Kentucky common-law tort claims like those at issue are not preempted. The Sixth Circuit distinguished preemption of state common law claims from the Act's displacement of federal common law announced in *American Electric Power Co. v. Connecticut*, ___ U.S. __, 131 S.Ct. 2527 (2011), by stating that § 7416 expressly allows states to set more stringent standards than does the Act. But the Sixth Circuit did not consider the effect of KRS 224.10-100(26), in which Kentucky

expressly declines to set stricter standards.

The Distillers believe the common law claims pressed by Plaintiffs are preempted because they are in conflict with and an obstacle to the methods Congress has chosen to accomplish its goals in the Act. In *Merrick*, the Sixth Circuit utterly failed to examine whether common law claims like those at bar would conflict with or act as an obstacle to achieving the methods of Congress, merely stating that the "common law standards" adopted by state courts are "requirements respecting control or abatement of air pollution" under § 7416. *Id.* at 690-91. If the Act's savings clause were allowed to paper over an actual conflict between the state common-law claims and the Act's goals and methods, the Act would "defeat its own objective, or potentially, as the Court has put it before, [] destroy itself." *Geier v. American Honda Motor Co., Inc.*, 529 U.S. 861, 872 (2000).

Plaintiffs' brief spends seven pages discussing various theories of preemption on which the Distillers do not rely. To be clear, it is the principle of "obstacle" conflict preemption which bars the Plaintiffs' common law claims - especially their demand for an injunction mandating the use of a specific type of emission control technology. Unlike other types of preemption, obstacle preemption requires this Court to conduct a case-specific analysis of the claims at issue in light of the goals and methods of the Act. While Congressional intent is the touchstone of any preemption inquiry, "conflict preemption is different in that it turns on the identification of 'actual conflict,' and not an express statement of pre-emptive intent." *Geier*, 529 U.S. at 884. In obstacle preemption cases, "clear

evidence of a conflict" is all that is needed to support a finding of preemption, because "one can assume that Congress or an agency ordinarily would not intend to permit a significant conflict." *Id.* at 885.

The conflict presented by Plaintiffs' claims is particularly egregious in the context of their demands for injunctive relief in the form of an order mandating that the Distillers install RTO technology, untested in the bourbon industry, to capture the ethanol that naturally escapes from their warehouses of aging bourbon. Plaintiffs have not alleged and cannot allege that the emissions they seek to enjoin are anything but wholly lawful and permitted. Plaintiffs point to their Amended Complaint, which alleges that the Distillers are not in compliance with their permits because they "release ethanol into the atmosphere in amounts similar or greater than Diageo which was issued a Notice of Violation."[1] [Plaintiffs' Brief at 27.] But these Distillers are not Diageo, and non-compliance with permits is not a transitive property. Assuming *arguendo* that a Notice of Violation were a final agency action with any legal force [*but see* Distillers' Brief at 12 fn 7], these Distillers have received no Notices of Violation, which shows they are not in Diageo's position.

If the Distillers were in violation of their permits, Plaintiffs could pursue a citizen suit remedy under § 7604 of the Act, which they have made no effort to

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[1] Even assuming Plaintiffs' causation theory is valid, the quantity of ethanol emitted, standing alone, is wholly insufficient for comparing the potential impacts of emissions. At a minimum, one would need to also know the size of each distiller's property, the locations of the warehouses thereon, and the proximity of neighboring properties.

do. Plaintiffs also have the option to use the methods laid out in the Act to petition EPA for a rule-making that would answer the question of whether the RTO technology they trumpet in the Amended Complaint is indeed "reasonably available control technology" with respect to the ethanol emissions of aging bourbon. Instead, Plaintiffs are seeking a court order requiring the Distillers to adopt this untested technology, to the potential detriment or destruction of hundreds of thousands of barrels of bourbon. The Circuit Court correctly recognized that ordering the Distillers to "conform to a different or higher standard of acceptable practices that have not undergone the proper administrative rulemaking process" was beyond her authority. [Appx. B to Distillers' Brief at 4.] Without doubt, such an order would frustrate the objectives and purposes of Congress as set forth in the Act.

The Plaintiffs' brief makes no effort to defend their demand for injunctive relief. Conflict preemption principles are of great importance when plaintiffs demand injunctive relief, and courts are careful to protect Congress's chosen methods to achieve its goals when plaintiffs seek to alter defendants' conduct otherwise authorized by federal law. For instance, in *Geier*, the plaintiffs wanted to hold defendants accountable for failing to install airbags in all their cars, when a federal "standard deliberately provided the manufacturer with a range of choices among different passive restraint devices." 529 U.S. at 875. The claims – which sought to direct actions contrary to the actions allowed by Congress – were preempted. Similarly, while holding that state tort claims based on failure

to warn were not preempted in *Wyeth v. Levine*, 555 U.S. 555, 565 (2009), the U.S. Supreme Court majority was careful to note that its finding did not extend to a holding that state common law could forbid certain conduct that federal law allowed. ("We therefore need not decide whether a state rule proscribing intravenous administration would be pre-empted.") And in *Fidelity Fed. Sav. and Loan Ass'n v. de la Cuesta*, 458 U.S. 141, 155 (1982), the U. S. Supreme Court declared that a rule created by California courts was preempted because it would have prevented banks from making use of certain loan terms that were permitted (though not compelled) by federal law.

A district court order for injunctive relief to install new technology is exactly what the Fourth Circuit struck down in *North Carolina ex rel. Cooper v. TVA*, 615 F.3d 291 (4th Cir. 2010).[2] An injunction is also – and not coincidentally – the relief that the plaintiffs were seeking in *AEP*: "a decree setting carbon-dioxide emissions for each defendant at an initial cap, to be further reduced annually."

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[2] Claiming *Cooper* "has been severely criticized by at least one court and two Harvard Law Review articles" [Plaintiffs' Brief at 33], Plaintiffs partially quote from *E. I. DuPont de Nemours and Company v. Kolon Industries, Inc.*, 894 F. Supp. 2d 691 (E.D. Va. 2012). But the criticism in *Kolon* was directed to the scope of the injunction entered by the district court, not to the Fourth Circuit decision overturning that injunction:

> In *North Carolina, ex rel. Cooper*, the district court simply applied the wrong law in direct contravention to the decision of the Supreme Court of the United States specifying the law to be applied in cases of the sort there involved. That simply is not the issue here and, unlike *North Carolina, ex rel. Cooper*, granting an injunction against Kolon here does not implicate principles of federalism at all.

Id. at 719 (emphasis added). Furthermore, the "two Harvard Law Review articles" invoked by Plaintiffs consist of one "Recent Case" note in the Harvard Law Review, dated May 2011, with no identified author, and one student article in the Harvard Environmental Law Review, also dated 2011. In short, one or at most two students at Harvard Law School in 2011 disagreed with the Fourth Circuit's decision in *Cooper*.

131 S.Ct. at 2532. The U. S. Supreme Court held that allowing such standards to be set by federal judges, "in suits that could be filed in any federal district, cannot be reconciled with the decision-making scheme Congress enacted." *Id.* at 2539.

The rationale set forth in *AEP* makes clear that allowing judges to issue injunctions over top of permits is contrary to the goals of Congress and to its methods in designating an expert agency, the EPA, to use its expertise and scientific, economic, and technological resources in order to serve as the primary regulator of air emissions. That rationale is equally compelling in the context of state court judges, who have no more access than do federal court judges to the resources and expertise of administrative agencies, and no more opportunity to "commission scientific studies or convene groups of experts for advice, or issue rules under notice-and-comment procedures inviting input by any interested person, or seek the counsel of regulators in the States where the defendants are located. Rather, judges are confined by a record comprising the evidence the parties present." *Id.* at 2540. An injunction would contradict the methods chosen by Congress to properly implement the Act's goals of certainty and air quality.

Plaintiffs' claims, if allowed to proceed, will eliminate the certainty and predictability that Congress sought to establish under the Act for business entities like the Distillers, whose emissions are carefully regulated via detailed permits. EPA and the courts have acknowledged that "provid[ing] a degree of certainty to [a] source regarding its obligations" is a primary goal of the Act

along with improving air quality. 57 Fed. Reg. 32,250, 32,277 (July 21, 1992); *see also Virginia v. Browner*, 80 F.3d 869, 873 (4th Cir. 1996) (clarity of permits is "crucial to the implementation of the Act.") The Distillers, like other businesses whose activities lead to regulated air emissions,[3] rely on the extensive permits that specify all that the Act requires of them in order to manage operations and plan investments while staying in compliance with the law.

If the Distillers were potentially subject to liability under state common law for permitted air emissions, it would be impossible for the Distillers to prospectively identify the legal requirements associated with their air emissions. As the Fourth Circuit observed in *Cooper*, allowing tort suits to restrict air emissions would mean that any "company, no matter how well-meaning, would be simply unable to determine its obligations ex ante." 615 F.3d at 306. Allowing Plaintiffs to proceed with their common law claims for nuisance, trespass, and negligence will actually conflict with a significant goal of the Act, and present an obstacle to the method Congress has chosen to achieve that goal.

Plaintiffs suggest that the lack of an express preemption clause and the presence of limited savings clauses in the Act are sufficient to demonstrate that there is no conflict or obstacle preemption problem here. [Plaintiffs' Brief at 29.] But it is well recognized that the mere presence of a savings clause is not enough to avoid conflict preemption: the U. S. Supreme Court has "refused to read

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[3] See the *amicus* brief filed by the Kentucky Chamber of Commerce and Kentucky Association of Manufacturers.

general 'saving' provisions to tolerate actual conflict." *Geier*, 529 U.S. at 874. In every case, the court should examine the statute and the circumstances at bar to determine whether an actual conflict exists, *id.* at 869, 874, particularly where, as here, the source state has prohibited standards that are more stringent than the federal and there are no higher Kentucky standards to "save."

Plaintiffs essentially ignore the explanation and elements of conflict preemption set forth in the Distillers' brief. They use one case to discuss conflict preemption, *In re MTBE Prods. Liab. Litig.*, 725 F.3d 65 (2nd Cir. 2013). But the claims there were vastly different from those here. *In re MTBE* is not a case in which the defendants' challenged activity was conducted in full accord with permits duly issued to them by the governing administrative agencies under the Act. It is not even a case about air emissions. In *MTBE*, the plaintiffs sued gasoline producers for groundwater contamination, when gasoline laced with MTBE leeched from underground storage tanks. The gasoline producers argued that the negligence claims were preempted, because the Act required gasoline manufacturers to use any one of several additives (including MTBE) in their gasoline, in order to reduce air emissions from vehicles.

The conflict preemption analysis in *In re MTBE* was limited solely to whether state law regarding groundwater spills conflicted with provisions of the Act that mandated the use of gasoline additives. The Second Circuit found that preemption was unnecessary to preserve the goals and methods of the Act, since it was not the use of MTBE but its negligent storage that generated liability for

the defendants. *Id.* at 103-104. The Second Circuit's application of conflict preemption principles to the very different factual and legal scenario in *In re MTBE* has little if any guidance to offer this Court, where the Distillers' allegedly wrongful conduct consists only of allowing ethanol to escape from their aging barrels of bourbon – conduct wholly in accord with the lawful permits the Distillers have received from the regulators charged with enforcing the Act.

CONCLUSION

Claims under state law that conflict with the goals or methods of a federal law and regulations are preempted. The Plaintiffs' claims in this lawsuit constitute a collateral attack on the permitting method established by Congress under the Act. A state's right to more stringently regulate in-state emissions cannot be construed to encompass a private common-law right of action – and in no event can it be construed to allow a state court judge to order injunctive relief that demands the Distillers adopt new technology to regulate the emissions that are wholly in accord with permits granted to them by the administrative regulators. This course is particularly inappropriate in Kentucky, a state that has actively rejected the federal invitation to establish state standards for air emissions that are more stringent than federal law.

Respectfully submitted,

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